In Case 101/74

DIETRICH KURRER, a former official of the Council of Ministers, represented by Marcel Slusny, Advocate at the Cour d'appel, Brussels, with an address for service in Luxembourg at the office of H. Steinfort, 15, boulevard Grande-Duchesse Charlotte,

applicant,

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by R. O. Dalcq, Advocate of the Brussels Bar, acting as Agent, with an address for service in Luxembourg at the chambers of Mr Loesch, 2 rue Goethe,

defendant,

Application for the payment of certain sums under Article 73 of the Staff Regulations for Officials,

THE COURT (Second Chamber)

composed of: H. Kutscher, President of Chamber, M. Sørensen and Lord Mackenzie Stuart, Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and arguments expounded by the parties in the course of the written procedure may be summarized as follows:

I — Facts and procedure

Article 73 (1) of the Staff Regulations of Officials provides that:

'An official is insured, from the date of his entering the service, against the risk of occupational disease and of accident subject to rules drawn up by common agreeement between the Institutions of the Communities after consulting the Staff Regulations Committee. He shall contribute to the cost of insuring against non-occupational risks up to 0·1 % of his basic salary'.

By staff memoranda of 1966, 1967 and 1968 the officials of the Council were notified that, pending the drawing up of the rules provided for in this article, the Secretary-General had effected a policy of accident insurance in order provisionally to settle the conditions on which the benefits provided for in Article 73 might be granted. Those memoranda indicate the risks covered but do not set out all the details of the policy.

Mr Kurrer was an official with the Council from 1958 to 1973 when he resigned from the service under the procedure then introduced, as a result of the accession of the new Member States. At the time of his resignation he was 50 years old and classified in Grade A 4.

On 7 July 1968 Mr Kurrer was involved in a traffic accident, outside the performance of his duties, which entailed his partial permanent invalidity. In order to initiate the procedure for obtaining the invalidity benefits payable to him under Article 73 (2) (c) of the Staff Regulations he signed an accident declaration on the form issued by the insurer.

Mr Kurrer's private doctor was not able to issue the certificate showing that the wounds had healed until March 1972.

The specialist consulted by Mr Kurrer's private doctor fixed the rate of Mr Kurrer's permanent invalidity at 30 %. For his part the medical adviser of the insurer considered, that, in view of Mr Kurrer's medical history, the invalidity, if any, was so slight 'that the rate would never be accepted by Mr Kurrer'.

In accordance with the provision in the insurance policy which provides for arbitration in cases of dispute the Council requested Mr Kurrer to appoint his representative for the arbitration procedure. On 30 November 1972 Mr Kurrer notified the administration that: 'Doctor A. Olmechette has agreed ... to defend my interests ...' in the arbitration procedure. The latter signed the arbitration agreement. The insurer was represented by a psychiatric expert. The two doctors agreed on a rate of invalidity of 20 % without its being necessary to call in a third arbitrator.

By a note of 21 February 1974 Mr Kurrer informed the administration that 'with reference to your request I beg to inform you that I hereby agree to the rate of 20 % proposed by the insurers in settlement of the allowance for the permanent invalidity which I have suffered. Kindly note that the sum obtained by calculation at the rate of 20 % should be paid to my account'.

By a note of 10 March 1974 Mr Kurrer requested the administration to transfer the allowance to his bank account in Germany on the same basis and on the same conditions as the other emoluments governed by the provisions of the second and third paragraphs of Article 63 of the Staff Regulations, that is to say, the application of the par values accepted by the International Monetary Fund in 1965 (Bfrs 12·50 = DM 1) for the conversion of this allowance into Deutschmarks.

The sum of Bfrs 720 000 was transferred to Mr Kurrer and converted into Deutschmarks by the bank at the daily rate (Bfrs 15·33 = DM 1).

In a complaint of 20 May 1974 Mr Kurrer

(1) disputed that he had ever accepted the rate of 20 % *vis-à-vis* the Council, claiming that he had given his agreement only to the Council's insurer. According to him the Council had never disputed the rate of 30 %;
(2) complained that the Council had transferred the sum to Germany leaving it to be converted into Deutschmarks by the bank at the daily rate and not on the basis of the official par values, thereby infringing Article 63 of the Staff Regulations.

(3) complained that the Council had interpreted Article 73 (2) (b) of the Staff Regulations restrictively with regard to the salary to be taken into account in calculating the allowance.

By a letter of 20 September 1974 the Council expressly rejected Mr Kurrer's offical complaint.

On 20 December 1974 he lodged the present application against the decision expressly rejecting his official complaint.

On hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The applicant claims that the Court should:

1. (a) Rule null and void the express refusals met with by the applicant in the reply of the defendant dated 20 September 1974;
   (b) Rule null and void and in any case not capable of being cited against the applicant the insurance policy of the Securitas company as to that part thereof which was not published and/or brought to the attention of the staff and which in any case was not subjected to the consultation procedure laid down in Article 110 of the Staff Regulations;
2. Rule null and void the defendant's decision not to grant the applicant any allowance over and above the amount which was paid by the J. Van Breda insurance company;
3. Declare and adjudge that the defendant must accept as the basis for calculation of the compensation the rate of 30 % fixed by Drs Larock and Olmechette;
4. Order the defendant in any event to pay the applicant additional compensation calculated on the difference between the rate of 20 % which was accepted and the rate of 30 % which should have been accepted, that is to say, subject to adjustment in the course of the proceedings, Bfrs 360 000.
5. Declare and adjudge that the sums remitted to the applicant should have been calculated on the basis of the conversion rate provided for by Article 63 of the Staff Regulations;
6. Order the defendant to pay under this head forthwith a supplement estimated at Bfrs 100 000 subject to calculation by the defendant;
7. Declare and adjudge that all sums still due by the defendant to the applicant must be remitted to him at his residence, taking account of the abovementioned conversion rate;
8. Order the defendant to pay applicant the sum of DM 49·60 which was wrongly witheld;
9. Taking note of the wrongful acts or Commissions referred to by the applicant order the defendant to pay him damages to be fixed *ex aequo et bono;*
10. Order the defendant to bear the costs of the proceedings;

As an alternative to the claim made under head 6

In any event order the defendant to pay the applicant the difference between the rate of exchange applied by the bank, that is to say Bfrs 15·10 to DM 1, and the last rate accepted by the International Monetary Fund, that is to say, Bfrs 13·66 to DM 1 for the sum of Bfrs 720 000, that is to say, reserving calculation by the defendant and reserving the right to adjustment in the course of the proceedings, a supplement in German marks equivalent to Bfrs 88 790.

The Council contends that the Court should:

— Dismiss the application;
— Order the applicant to pay the costs.

III — Submissions and arguments of the parties

The rate of invalidity

The *applicant* maintains that he suffers from permanent invalidity at a rate of 30 %. The Council adopted the conclusions of the applicant's specialist by appointing him to represent the interests of the Council in the arbitration proceedings with the doctor appointed by the Council's insurer.

Under Article 73 of the Staff Regulations the Council must accordingly provide the applicant with a lump sum on the basis of the actual rate of his invalidity, that is to say, 30 %.

The fact that the rules provided for in Article 73 of the Staff Regulations have not been drawn up and that in the meantime the Council has effected a private insurance policy cannot have the effect of detracting from rights conferred by this article: Case 18/70 *X* v *Council* ([1972] ECR 1205).

Only that part of the insurance policy which has been brought to the attention of officals can be considered for the purpose of Article 73 of the Staff Regulations. The arbitration procedure provided for by the policy was not brought to the attention of officials. Furthermore, until the adoption of rules for the institutions the insurance policy must be considered as a measure in implementation of Article 73 which, under Article 110 of the Staff Regulations, may not be adopted without consulting the Staff Regulations Committee. Such failure to comply with Article 110 renders the policy null and void or at least not capable of being cited against the applicant.

In any event *vis-à-vis* the Council the applicant has never accepted the conclusions of the arbitration commission. The arbitration is a procedure provided for in the relations between the Council and its insurer; it cannot be treated as equivalent to the procedure for finding a rate of invalidity laid down in the common rules. In fact if the rules had been adopted the applicant would have appeared before a medical board comprised exclusively of independent doctors and not before a doctor nominated by a third party.

Although the applicant appeared to have accepted the rate of invalidity as determined by the arbitration pursuant to the insurance policy he did so only in order to facilitate the task of the Council in obtaining payment under its private insurance policy. Prior to his note of 20 May 1974 he indicated verbally that he did not abandon any right *vis-à-vis* the Council.

In addition, even if it is considered that the applicant has accepted the rate of 20 % put forward by the insurer, such consent is vitiated by defects arising from violence, error and fraud. At the time he was psychologically incapable of giving his consent. He thought and was led to believe that the rate of 20 % had been decided by a third arbitrator

The applicant suggests that if the Court does not consider that the Council is bound to respect the rate of 30 %, the Court should appoint its own experts, to fill the lacuna in the Staff Regulations.

The *Council* maintains that it has never concurred in a rate of 30 %. The applicant appointed his doctor to represent his interests and he himself finally agreed to the rate of 20 % proposed by the expert appointed by the insurer.

Article 73 does not provide that in a case of permanent invalidity the allowance shall be calculated on the basis of the actual rate of invalidity but on the basis of a scale. There are no rules and therefore no scale exists (the scale contained in the insurance policy does not cover the invalidity of the applicant).

Since during the interim period the insurance policy has to be read into Article 73 of the Staff Regulations in order to determine the conditions on which the benefits provided for in Article 73 are ensured and granted the Council was correct in this connexion in applying the provisions of the policy.

The Council considers that effecting an insurance policy cannot be treated as equivalent to a measure in implementation of Article 73 so that it was unnecessary to consult the Staff Regulations Committee.

The applicant voluntarily agreed to submit to the arbitration procedure; the arbitration was proposed to him not imposed upon him and he ultimately accepted it in full knowledge of the circumstances.

The amount of the lump sum

The *applicant* asserts that if the rules had been drawn up between the institutions he would have been able, under the second subparagraph of Article 73 (2) of the Staff Regulations, to request an annuity instead of a lump sum. An annuity would have had to be adjusted taking into account the depreciation in the value of money and the rise in salaries. The allowance should consequently be increased on an equitable basis.

The *Council* explains that the insurance policy only provides for the payment of a lump sum. On the other hand since Article 73 of the Staff Regulations provides that an annuity may be substituted for a lump sum the applicant could have requested payment of an annuity. It was only after he had received the lump sum that the applicant claimed that, because he could have taken an annuity related to the cost of living, the lump sum should be increased, but no such provision is made by Article 73 of the Staff Regulations.

In addition it is not certain that provision is made for an annuity related to the cost of living. In any case it is extremely improbable that the rules contemplate an increase in the lump sum since the advantage of a lump sum lies in fact that the beneficiary may at his option so use it as to protect him against depreciation in the value of money.

In his reply the *applicant* states that if an annuity is available to him he would now be prepared to request one instead of a lump sum.

In its rejoinder the *Council* considers that this request is out of time since the applicant has already received a lump sum and has never previously requested that it should be replaced by an annuity.

The delay in paying the lump sum

The *applicant* states that the delay in the payment of the lump sum has caused him specific damage. Because of this delay he was unable to benefit, in the calculation of the allowance, from increases in salary under Article 65 of the Staff Regulations occurring after 1968. Furthermore, Article 73 (2) (b) does not expressly provide for the payment of interest which is normally payable from the day of the accident and compensates for the delay. The non-payment of interest involves specific damage. In fact if he had received the allowance sooner he could have invested it to protect himself against inflation. At least the Council should have paid one or more advances voluntarily to the applicant.

The *Council* maintains that the delay in payment was caused primarily by the applicant's slow recovery from his injuries and also by the medical dispute over the rate of invalidity. The applicant provides no proof as to how this delay is to be imputed to the Council. The Council considers that interest to compensate for delay in payment is unjustified either in fact or in law. Such interest is not recognized in Community

law: Cases 27 and 39/59 *Capolongo* v *High Authority* Rec. 1960, p. 794).

The fact that rules have not been drawn up in implementation of Article 73 of the Staff Regulations cannot be considered as a wrongful omission involving the Community in liability. It is clear that the allowances payable in inplementation of Article 73 of the Staff Regulations must be calculated by reference to the 'amounts of salary received during the twelve months before the accident'.

The rate of conversion

The *applicant* considers that 'remuneration' within the meaning of Article 63 of the Staff Regulations must be taken to be not only the salary properly so called but also all allowances calculated on the basis of the salary which are intended to compensate a loss suffered by the official.

The rate of conversion of the allowance should have been calculated on the basis of the par values accepted by the International Monetary Fund and in force on 1 January 1965. Given the similarity of the situations referred to in the three chapters of Title V of the Staff Regulations the absence of any mention in Article 73 of the rates of conversion is not significant.

In addition the payment of the lump sum in Germany should have been effected without any deduction of expenses whatsoever. The Council should have ordered a bank to place at the disposal of the applicant the equivalent in German marks of Bfrs 720 000 calculated on the basis of the par value provided for in Article 63 of the Staff Regulations or, alternatively, in accordance with the official rate.

According to the *Council,* since the applicant continued to draw his salary up to the day when he left the institution, he has not suffered any loss.

The cases in which the rates of conversion of the International Monetary Fund are to be applied are expressly laid down in the Staff Regulations and do not include the allowances paid on the basis of Article 73 of the Staff Regulations.

The Council emphasizes that it is impossible to arrive at a solution favourable to all officials. A decision such as that desired by the applicant would undoubtedly be beneficial to the Germans but would be unfavourable to the Italians. Furthermore the Council stresses that paragraphs (2) and (3) of Article 63 are in the nature of an exception to the general law which in all countries provides that when a debt has to be paid in a currency other than that of the place in which it is due, conversion shall take place on the basis of the rates of exchange on the day of payment.

With regard to the banking expenses the Council recalls that Article 17 (1) of Annex VII provides that payment shall be made to each official at the place and in the currency of the country where he carries out his duties. It also governs cases where a transfer may be authorized without expenses. The allowances in question do not feature amongst such cases.

IV — Oral procedure

The parties presented oral argument at the hearing on 4 December 1975.

Since an alteration in the composition of the Chamber had in the meantime occurred the oral procedure was repeated on 5 February 1976. The parties declared that they maintained their positions set out in the previous oral proceedings. In the course of this hearing the Advocate-General delivered his opinion.

Law

1 The applicant, a former official of the Council of the European Communities employed in the Secretariat, sustained partial permanent invalidity following a motor-car accident and thereby became entitled to an allowance under Article 73 (1) of the Staff Regulations of Officials.

2 Since the applicant considered that the amount of the allowance granted to him was insufficient he submitted a complaint to the Council on 20 May 1974.

3 The Council rejected this complaint on 20 September 1974 and the applicant lodged the present application for the annulment of the decision of rejection and consequently for payment of the difference between the sum which he received and that which he considers due to him.

4 The applicant bases his submissions both on infringement of the Staff Regulations and on the general principles of natural justice.

5 First, the applicant complains that the Council has paid him the allowance provided for in Article 73 (2) of the Staff Regulations of Officials on the basis of a rate of invalidity of 20 % although it has itself conceded that he suffers from 30 % invalidity.

6 Article 73 (1) provides that rules shall be drawn up by agreement between the institutions of the Communities establishing *inter alia* the conditions on which officials are covered against non-occupational risks.

7 Since those rules had not yet been drawn up the Council, as a provisional measure, took out an insurance policy with an insurance company fixing the conditions on which cover was given against the risk.

8 By various staff memoranda the Council notified its staff that the provisions of the said policy provisionally laid down the conditions under which the benefits provided for in Article 73 would be guaranteed.

9 Thus the rights and obligations of the institution and of its servants are provisionally determined by Article 73 in conjunction with the policy.

10 In a case of conflict the provisions of the Staff Regulations prevail over the terms of the insurance policy since the latter cannot derogate from the rights which an official derives directly from the Staff Regulations.

11 In those circumstances the absence of rules drawn up by agreement between the institutions cannot adversely affect an official.

12 The specialist consulted by the applicant initially concluded that he suffered from partial invalidity at the rate of 30 %.

13 The insurer disputed this rate and arbitration was arranged in the form provided for by the insurance policy.

14 By a letter of 23 November 1972 the administration of the Council wrote to the applicant in the following terms:

'Please state as soon as possible the name of the doctor who is to defend your interests in the arbitration procedure.'

15 On 30 November 1972 the applicant, without raising objections as to the form of the arbitration, addressed to the administration of the Council a note worded as follows:

'Doctor A. Olmechette has agreed ... to defend my interests in the procedure proposed by the insurance company. I should accordingly be obliged if you would communicate directly with him as necessary.'

16 Since the rate of invalidity of the applicant is a question of fact, when the applicant expressly appointed his own doctor to defend his interests he thus had at his disposal all the means necessary to obtain a finding of fact favourable to him.

17 The doctor appointed by the applicant and the doctor appointed by the insurer agreed on a rate of invalidity of 20 % without its being necessary to have recourse to a third arbitrator.

18 In those circumstances it is unnecessary to consider whether Article 73 of the Staff Regulations would have allowed the applicant to insist on the choice of another method of determining the rate of invalidity since, by appointing his own doctor expressly to defend his interests, he had, in full knowledge of the circumstances, indicated in advance his agreement to the outcome of the arbitration in question.

19 Consequently it is no longer possible for the applicant to call in question the rate of invalidity found in the arbitration procedure accepted by him.

20 It should also be stated that by letter of 21 January 1974 the applicant notified the administration as follows:

'With reference to your request I beg to inform you that I hereby agree to the rate of 20 % proposed by the insurers in settlement of the allowance for the permanent invalidity which I have suffered. Kindly note that the sum obtained by calculation at the rate of 20 % should be paid to my account No ... in Germany.'

21 No evidence has been put forward by the applicant in support of his allegation that the Council exerted pressure on him to accept the rate of 20 %.

22 On the contrary this allegation is contradicted by the facts.

23 The complaint of the applicant regarding the fixing of the rate of invalidity must thus be rejected as unfounded.

24 The applicant claims secondly that if the rules provided for by Article 73 (1) had existed he would have been able, under the second subparagraph of paragraph (2) (c), to request an annuity instead of a lump sum.

25 Such an annuity could have been adjusted to take into account the depreciation in the value of money and the rise in salaries.

26 He claims that there are consequently grounds for making *ex æquo et bono* an increase in the lump sum received by him.

27 However, the applicant accepted without reservation the award of the invalidity benefit on the basis of a lump sum in accordance with Article 73 (2) (c).

28 In those circumstances he cannot rely on arguments based on the method of calculating an annuity which he has not requested in order to claim an increase in the lump sum.

29 This complaint is unfounded.

30 Thirdly the applicant maintains that the delay in payment of the lump sum has caused him damage.

31 Since there is no provision of the Staff Regulations or of the insurance policy which expressly provides for the payment of interest it is for the applicant to establish that the delay in payment of the allowance constitutes a wrongful act or omission on the part of the Council which has in fact caused him damage.

32 Since the applicant has failed to establish that the Council is guilty of a wrongful act or omission this complaint must be rejected as unfounded.

33 The applicant claims fourthly that when the Council transferred to his bank account in Germany the amount of the allowance payable to him under Article 73 of the Staff Regulations it should first have converted the amount, expressed in Belgian francs, into Deutschmarks on the basis of the par values accepted by the International Monetary Fund which were in force on 1 January 1965, in accordance with Article 63 of the Staff Regulations.

34 However, Article 63 of the Staff Regulations governs only the payment of an official's remuneration.

35 It is clear from the context of Article 62 that this term refers only to the basic salary, increased where appropriate under the conditions laid down in Annex VII.

36 Furthermore, when the Staff Regulations or other regulations provide for the application of the rate prescribed in Article 63 they do so expressly, as for example in Article 82 of the Staff Regulations.

37 As an alternative the applicant requests the application of the rate of exchange given by the latest par value accepted by the International Monetary Fund pursuant to Article 17 (4) of Annex VII to the Staff Regulations.

38 Article 17 (1) of Annex VII lays down as a general rule that: 'Payment shall be made to each official at the place and in the currency of the country where he carries out his duties'.

39 Article 17 (2) together with paragraph (4) lays down an exception with regard to certain regular transfers which may, at the request of the official, be made in another Member State and in its currency.

40 Article 17 (4) provides that such regular transfers shall be made at the official exchange rate ruling on the date of transfer.

41 It is clear from the wording of paragraph (1) of the said article that its provisions refer exclusively to serving officials.

42 Furthermore, according to the wording of its heading, Annex VII to the Staff Regulations deals with 'Remuneration and reimbursement of expenses' and thus with the benefits referred to in Article 62 to 71 of the Staff Regulations.

43 Consequently, an official who has terminated his service cannot claim to be covered by Article 17 (4) of Annex VII on the occasion of the transfer of sums

payable to him under Article 73 of the Staff Regulations by way of social security.

44 Since this does not constitute one of the exceptional cases coming under Article 63 of the Staff Regulations or Article 17 of Annex VII thereto, the Council was correct in transferring the sums payable to the applicant to his bank account in the Federal Republic of Germany and in having them converted into Deutschmarks at the rate ruling on the day of transfer.

45 This complaint must thus be rejected.

46 Finally the applicant claims that the costs of the transfers to Germany of the sums payable to him under Article 73 of the Staff Regulations should have been borne by the Council.

47 The Staff Regulations do not contain any express provision as to whether the costs of transferring pecuniary benefits payable by the Community to its servants are to be borne by the party liable for payment or by the beneficiary.

48 It nevertheless appears just and reasonable to concede that since the Community is obliged to secure for its servants on final termination of their service the full amounts payable to them, it must itself bear any transfer costs.

49 In those circumstances the competent institution must bear the transfer costs so that the official may receive net, at his place of residence, the equivalent in his national currency of the sum outstanding at the place where he previously carried out his duties.

Costs

50 Under Articles 69 (2) and 70 of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs; however, the institutions are to bear their own costs in proceedings commenced against them by servants of the Communities.

51 The applicant has succeeded in only one of the heads of his application.

52 The Council must consequently bear one quarter of the costs of the applicant.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Orders the Council of the European Communities to reimburse to the applicant the banking expenses incurred in the transfers to the bank account of the applicant in the Federal Republic of Germany of the allowance payable to him under Article 73 (2) (c) of the Staff Regulations of Officials;**
2. **Rejects all the remaining submissions;**
3. **Orders the Council to bear its own costs together with one quarter of the costs incurred by the applicant.**

Kutscher Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 26 February 1976.

A. Van Houtte
Registrar

H. Kutscher
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 5 FEBRUARY 1976 [1]

Mr President,
Members of the Court,

1. This action, brought by a former official against the Council, arises from the compensation for partial permanent invalidity paid by the defendant institution in accordance with the decision of an arbitration tribunal specially appointed to determine the rate to be applied. His invalidity was the result of a motor-car accident in July 1968 in which the applicant, at that time employed by the Council, was involved whilst not on duty. The contingency was covered by the 'individual – group' insurance which at that time applied to officials of the Council under an insurance policy concluded by the Secretariat-General so as to lay down for

1 – Translated from the Italian.